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No. 01-1601

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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JEANNE WOODFORD, Warden, *Petitioner,*

v.

BRUCE WAYNE MORRIS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Bruce Wayne Morris was convicted of capital murder in 1987. In 1999, the district court denied relief, but the Ninth Circuit Court of Appeals remanded the case to the district court for an evidentiary hearing pertinent to several of Morris's claims. After the remand, Morris informed the district court (and the Ninth Circuit) that he wished to forego further judicial proceedings. The district court issued an order to show cause why the petition for writ of habeas corpus should not be dismissed and set a hearing date. At the request of Morris's counsel, however, the Ninth Circuit without explanation recalled its earlier mandate, issued a writ of mandamus to prevent the district court hearing, and vacated Morris's penalty based on instructional error. The questions presented are:

1. Whether the Ninth Circuit acted without jurisdiction under Article III and abused its discretion when it vacated the district court's hearing on Morris's request to stop further proceedings and recalled the mandate to decide Morris's case without any determination as to Morris's competency to waive further proceeding.

2. Whether the Ninth Circuit's holding -- that the penalty phase jury was prejudicially confused by a jury instruction that mistakenly stated that if the jury had a reasonable doubt between the penalties of death or life *without* the possibility of parole that it shall impose the sentence of life *with* the possibility of parole -- conflicts with *Jones v. United States*, 527 U.S. 373 (1999).

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Morris's counsel admit that they resisted Morris's requests to end the litigation in his case. They do not refute the State's contention that this Court's decision in *Jones v. United States*, 527 U.S. 373 (1999) is indistinguishable from this case. Accordingly, the Ninth Circuit Court of Appeals acted without jurisdiction and in conflict with this Court's precedents when it recalled the mandate and vacated Morris's death sentence.

In this case, the Ninth Circuit Court of Appeals had originally reserved certain issues on appeal and as a matter of "judicial economy" remanded inmate Morris's case for an evidentiary hearing on claims of ineffective assistance of counsel and incompetency in the guilt and penalty phases. *Morris v. Woodford*, 229 F.3d 775 (9th Cir. 2000). Morris then asked the district court to terminate further proceedings in his case. The district court set a hearing to consider Morris's request. However, at the behest of Morris's counsel, the Ninth Circuit preempted the district court, recalled the mandate without explanation, and vacated the death penalty in his case for reasons directly contrary to *Jones*. The Ninth Circuit gave no reasons for preventing the district court from conducting a hearing into Morris's competency to end his case and it did not

even acknowledge Morris's direct request to the Ninth Circuit to waive further proceedings.

The Ninth Circuit's conduct raises two recurring and fundamental issues. First, the Ninth Circuit decided a case without determining it had jurisdiction. Morris's case is symptomatic of the continuing need for this Court to decide the appropriate procedures when Death Row prisoners ask to end their cases. *See, e.g. Hamilton v. Texas,* 497 U.S. 1016, 1017 (1990)(Brennan, J. dis.)

Second, when the Ninth Circuit reversed Morris's death sentence because of a typographical error in the penalty instructions, the panel speculated that the jury was confused to Morris's detriment about the consequences of a deadlock rather than concluding that Morris could not meet his burden of showing that the error actually affected his substantial rights as required by *Jones*. Thus, in determining prejudice, the panel substituted a standard based on "speculation" for a standard based on "actual effect."

I.

THE REPLY FILED BY MORRIS'S COUNSEL DEMONSTRATES THAT THE NINTH CIRCUIT COURT OF APPEALS LACKED JURISDICTION UNDER THE 'CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III WHEN IT VACATED MORRIS'S DEATH SENTENCE

The reply filed by Morris's appointed counsel buttresses the State's reasons for seeking certiorari in this case. Predictably, Morris's counsel now submit a declaration with a hearsay assurance that Morris now wants to continue his litigation and is "relieved" that his death sentence is vacated. **Conspicuous by its absence** is a personal declaration from

Morris.

Morris's counsel do not dispute that whenever Morris himself has personally spoken about his case, he has asked for the case to be dismissed and has stated that he does not trust his lawyers to represent him on this matter. Thus, this latest uncorroborated declaration from Morris's counsel is meaningless and actually emphasizes why the Ninth Circuit should have permitted the district court to hold a hearing to determine personally Morris's competency to waive further proceedings.

Morris's counsel admit that they defied Morris's requests to end his proceedings. This paternalistic attitude which caused counsel to disregard the wishes of their client is totally at odds with this Court's opinion in *Whitmore v. Arkansas*, 495 U.S. 149, 164 (1990). The district court found that each time Morris had

> attempted to exercise his right to terminate these proceedings and withdraw his petition for writ of habeas corpus petitioner has met the resistance from his counsel. Understandably, counsel are reluctant to advocate a position with which they legally and, perhaps, morally and ethically disagree.

(Petn. App. D at 5.) According to the district court, the record bore out Morris's concerns that "his court appointed counsel cannot adequately represent him in this regard. . . ." *Ibid.* Morris's counsel does not dispute the last time that Morris himself actually spoke directly to his intentions was prior to the Ninth Circuit's opinion in which he communicated to the California Attorney General and the Ninth Circuit that his counsel were "fighting" his actions. (Petn. Exh. F.)

When the Ninth Circuit granted the petition for writ of mandamus and motion to recall the mandate that Morris's counsel filed without Morris's permission, it became a party to Morris's counsel in forsaking their client. In doing so, the

Ninth Circuit exceeded its jurisdiction under Article III.

Morris's counsel justify their resistance to their client's desire to end his litigation because he has also maintained his innocence and because he always "changes" his mind. This is no justification for failing to represent their client. *See People v. Lang*, 49 Cal. 3d 991, 1031 (Cal. 1990). Moreover, outside of counsel's own hearsay declaration, there is no evidence Morris has changed his mind. Counsel's declaration must be viewed against the backdrop of the district court's findings and Morris's own assertions that his lawyers could not represent his interests on this issue. There is no explanation as to why Morris, who has shown no reluctance to express his mind when he has wanted to terminate his case, does not now provide a direct statement that he wants his case to continue.

Moreover, Morris's protestations of innocence are not decisive about his decision to end his case. The Ninth Circuit branded his defense at trial as "specious" and described the evidence of his guilt as "unusually strong. . . ." For instance, Morris did not just confess repeatedly to the police that he murdered his unlucky benefactor, Rickey Van Zandt. He also confessed to a disinterested third party and in letters to his own girlfriend. (Petn. App. A at 17; *People v. Morris*, 53 Cal. 3d 152, 176-177 (1991).)

Morris sees the "writing on the wall." He knows that any success now is a Pyrrhic one that will only lead to "appeal and appeal in a case I have no relief to look forward to." (Petn. App. C at 2.) *See, e.g., Wilson v. Lane*, 870 F.2d 1250, 1254 (7th Cir. 1988); *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192 (9th Cir. 2001). He "appreciate[s] his position . . ." and has made a "rational choice. . . ." *Rees v. Payton*, 384 U.S. 312, 314 (1966).

When a prisoner, like Morris, chooses to forego his legal defenses he "create[s] a mine field for participants in the judicial system. . . ." *Block v. State*, 744 So.2d 404, 405 (Ala.1997) (Taylor, P.J. conc.). Despite the lack of guidance

from this Court or the Ninth Circuit, the district court prepared to traverse that minefield. The district court's hearing would have determined if Morris had the capacity to appreciate his position and make a rational, informed choice. Morris's counsel and the Ninth Circuit frustrated the district court without providing then or now any demonstration that Morris had abandoned his intent to bring his litigation to an end. Nor was there any evidence that Morris was incompetent to make that decision.

When the "minefield" is jurisdictional, a court cannot simply leap over it.[1/] The Ninth Circuit's extrajurisdictional decision requires review.

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1. Contrary to the argument by Morris's counsel, Morris's situation is not "similar" to *Lonchar v. Thomas*, 517 U.S. 324 (1996). Unlike Morris, the court did not ignore Lonchar's expressed wishes, but actually conducted a judicial competency hearing. Moreover, in *Lonchar*, the issue involved whether a district court could dismiss a first petition as delayed for equitable considerations not covered by Rule 9 of the Rules Governing Section 2254 Cases. *Lonchar* does not present the basic Article III jurisdictional issue in this case–an inmate, Morris, who requests to end his pending federal proceedings. *Lonchar* is simply another example of the recurring problem of handling inmates whose intentions regarding their litigation change and evolve over time.

II.

THE NINTH CIRCUIT'S ADVISORY DECISION VACATING MORRIS'S DEATH PENALTY DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS SINCE THE NINTH CIRCUIT FOUND PREJUDICE BASED ON SPECULATION ALONE

Without determining that it was merely issuing an advisory opinion, the Ninth Circuit vacated Morris's death sentence because of an erroneously typed penalty instruction that nonsensically stated that if the jury had a reasonable doubt as to whether to impose a sentence of death or life *without* the possibility of parole it should impose an even lesser verdict of life *with* the possibility of parole. The Ninth Circuit's decision deviates directly from this Court's precedent by finding prejudice when the petitioner has failed to show an effect on his substantial rights. Morris's counsel's reply brief simply reiterates the Ninth Circuit's error.

Both the Ninth Circuit and Morris's counsel acknowledge that the same issue was raised when this Court affirmed the death judgment in *Jones v. United States*, 527 U.S. 373 (1999). They both purport to distinguish *Jones* because the trial court in *Morris's* case did not correct the instruction when the jury inquired about it. The Ninth Circuit and Morris's counsel both simply presume that the jury was confused to Morris's detriment and that jurors who were voting for life *without* the possibility of parole were pressured to vote for death to avoid a deadlock and potential lesser sentence of life *with* the possibility of parole so that he would never be released from prison.[2/]

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2. As this Court noted in *Jones*, it is equally plausible that jurors who favored death would have agreed to vote for life

The problem, of course, is that the Ninth Circuit and Morris's counsel ignore *Jones*. Neither the Ninth Circuit nor Morris's counsel acknowledge the explicit language in *Jones* that held that "even assuming that the jury was confused over the consequences of deadlock", the potential meaning of such confusion is too uncertain, indeterminate, and speculative to show an effect on a defendant's substantial rights. *Jones*, 527 U.S. at 394-95. The reply does nothing to rebut the State's position that the Ninth Circuit's decision conflicts directly with *Jones*.

Despite *Jones's* holding to the contrary, the Ninth Circuit plainly reversed Morris's penalty phase based on mere speculation, rather than an actual demonstration of an effect on Morris's substantial rights. The Ninth Circuit's opinion regressed from the series of cases in which this Court analyzed and refined the standard for instructional error based on actual prejudice. *Romano v. Oklahoma*, 512 U.S. 1, 14 (1994); *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *O'Neal v. McAninch*, 513 U.S. 435 (1995); *Calderon v. Coleman*, 525 U.S. 141, 146 (1998)(prejudice finding cannot be based on "mere

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without the possibility of parole. Since the jury was instructed that a sentence of life *without* the possibility of parole meant that Morris would never be released, it would be absurd for jurors favoring death to hold out for that sentence and risk a lesser sentence of life *with* the possibility of parole. The Ninth Circuit also ignored the equally plausible explanation that the jury merely had an understandable technical curiosity about a single isolated instruction that advised it of an absurd potential verdict of which it had never been previously apprised and for which it had received no verdict forms. The Ninth Circuit also did not consider that a jury would have more reasonably concluded that, if anything, the lesser third verdict applied if it concluded that Morris should not receive either of the greater verdicts.

speculation") and *Jones v. United States*. The erosion of this Court's harmless error and prejudice precedents, in defiance of this Court's direct precedent, is a compelling and important reason to grant review.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, the petition should be granted.

Dated: August 6, 2002

Respectfully submitted,

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